No. 92-725

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,
Petitioner,

v.

RICHARD ALLAN MORAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES, THE JOSEPH P. KENNEDY, JR. FOUNDATION, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, and THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAMES W. ELLIS
Counsel of Record
BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:
CHRISTIAN G. FRITZ

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THE AMERICAN ASSOCIATION ON MENTAL RETARDATION,
THE ARC,
THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS,
THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES,
THE JOSEPH P. KENNEDY, JR. FOUNDATION,
THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, and
THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

Amici curiae include national professional, voluntary, and advocacy associations concerned with people with mental disabilities. *Amici* thus have knowledge and expertise in the evaluation of people with mental illness and mental retardation and their treatment within the criminal justice system.[1]

THE AMERICAN PSYCHIATRIC ASSOCIATION (APA), founded in 1844, is the nation's largest organization of psychiatric physicians, with approximately 40,000 members. The Association has participated as *amicus curiae* in numerous cases involving psychiatric issues.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary organization of psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of mental disabilities.

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation.

THE ARC (formerly the Association for Retarded Citizens of the United States) is the nation's oldest and largest association of families, professionals and individuals with disabilities devoted solely to promoting the interests of citizens with mental retardation and their families. Since its founding in 1950, The Arc has participated actively in the formulation of public policy with respect to the rights of, and services for, citizens with mental retardation.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000

[1] Petitioner and Respondent in this case have consented to the filing of this brief.

teachers, parents, physicians and other professionals dedicated to developing educational and habilitative services for persons with severe disabilities and protecting the civil rights of those individuals.

THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES represents approximately 650 agencies in 49 states and the District of Columbia that together provide residential services and community support to more than 40,000 people with mental retardation and other developmental disabilities. Members offer a full range of services in a variety of settings designed to enhance the development and independence of those served.

THE JOSEPH P. KENNEDY, JR. FOUNDATION, established in 1946, has as its objectives the prevention of mental retardation and the improvement of the way in which society deals with persons who have mental retardation.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS (NAPAS) represents Protection and Advocacy systems in 50 states and six territories, created pursuant to 42 U.S.C. § 6000 *et seq.* These agencies have the statutory mandate to advocate for the rights of persons with mental disabilities.

THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY (NARPA) is the only national organization which addresses both mental health and retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and retardation services. NARPA was formed in 1979 as a result of coordinating efforts of the National Institute of Mental Health. Among NARPA's hundreds of members are people who design, live, and work in community and institutional services for people with mental retardation.

SUMMARY OF ARGUMENT

The criminal justice system today relies on pleas of guilty for the adjudication of large numbers of cases, and the bargaining process that produces these pleas provides a useful economy for judicial, prosecutorial, and defense resources. But the courts' historical skepticism expressed toward guilty pleas resonates in modern constitutional concerns about those pleas made by defendants with mental disabilities.

It is well settled that guilty pleas result in such important constitutional waivers that the relinquishment of these rights must be made both voluntarily and with understanding of what is being surrendered. Evidence that an individual has a substantial mental disability requires a careful evaluation of what that defendant can do and understand. An inquiry focused solely on whether the defendant has the skills required to stand trial does not provide the trial judge with the specific information needed to determine whether the defendant can competently plead guilty. The due process concerns about such a potentially incompetent waiver are magnified when the defendant also attempts to waive the right to counsel and proceed to adjudication without representation.

Before a defendant with mental illness or mental retardation can waive counsel and plead guilty, the trial court must have adequate assurance that the plea is knowing and intelligent. That assurance can only come with evaluations from mental disability professionals *who have been asked to address the appropriate, legally relevant question.* Anything less impeaches the fundamental fairness of the criminal process.

ARGUMENT

I. INCOMPETENT WAIVERS OF A MENTALLY DISABLED DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND TO A TRIAL IMPEACH THE FUNDAMENTAL FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM.

It has long been recognized that purported guilty pleas by defendants who may be mentally incompetent raise concerns of the utmost gravity. 4 Blackstone, *Commentaries* *24 (1769) (a "mad" defendant "is not able to plead to [the charge] with that advice and caution that he ought."); Weihofen, *Mental Disorder as a Criminal Defense* 454 (1954) ("A plea of guilty, to be valid, must be intelligently made."). Much of this concern derives from the unparalleled magnitude of the waiver. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Acceptance of incompetent pleas contains the potential for unjust convictions which would produce unfairness to defendants and erode public trust in the courts.[2]

Two reasons for "indulg[ing] every reasonable presumption against" the potentially incompetent waivers embedded in a guilty plea, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), are the possibility that the plea is unsupported by an adequate factual basis and the fundamental unfairness of holding a defendant to a "bargain" to which he did not competently agree.[3]

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[2] One respected commentator has observed that acceptance of such a plea would constitute "a ceremonial farce." Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behavioral Sciences & L. 291, 311 n. 88 (1992).

[3] This Court has indicated that in the context of criminal procedures the test for due process is whether a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. Cali-*

The concern about the factual basis for the plea is particularly justified for defendants who have a sub-

fornia, 112 S. Ct. 2572, 2577 (1992) (citations omitted). It is widely accepted that the prohibition on accepting a plea from an incompetent defendant is of long standing. But it is equally clear that the *reason* for the rule, that the defendant must understand what the plea arrangement involves, has been consistent through history as well. *See, e.g.*, Hale, *Pleas of the Crown* 34 (1736) ("because he cannot advisedly plead to the indictment"); 4 Blackstone, *Commentaries* *24 ("because he is not able to plead to it with that advice and caution that he ought"). *See also* Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 132 (1985) ("In all felony cases the court was supposed to ensure that defendants were fully aware of the implications of a guilty plea"). This same rationale is reflected in the American cases. *See, e.g., Commonwealth v. Battis*, 1 Mass. 95 (1804) (guilty plea would not be accepted until defendant was given time to reconsider); *Hallinger v. Davis*, 146 U.S. 314, 324 (1892) (trial "court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force, and effect of his plea of guilty."); *Pope v. State*, 47 So. 487, 488 (Fla. 1908) ("The plea should be entirely voluntary by one competent to know the consequences"); *State v. Hill*, 95 S.E. 21 (W.Va. 1918) ("[I]t was ancient law and is also settled by modern decisions, and in some states by statute, that a court should never in cases of capital crimes accept a plea of guilty without exercising caution and being satisfied by evidence that the confession is made by the accused freely and deliberately, and with full and perfect knowledge of the nature and consequences of the confession; otherwise the plea should not be received."). By contrast, when the courts addressed the issue of competence *to stand trial*, they employed terms that focused on trial skills and that are remarkably similar to *Dusky*. *See, e.g., R. v. Pritchard*, 7 Carr. & P. 303, 173 Eng. Rep. 135 (N.P. 1836) (whether the accused was "of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any [juror] to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."). Thus, rather than conclude that our legal tradition prohibited guilty pleas from defendants who were vaguely labeled "mad" or "incompetent," it would be more accurate to say that pleas were prohibited unless the defendant was competent to understand the nature and consequences of the plea.

stantial mental illness or mental retardation. Barring impermissible coercion, few nondisabled defendants are likely to agree that they committed an act which they did not do. But inculpatory statements by defendants who have a substantial mental disability "may be of questionable reliability." *ABA Criminal Justice Mental Health Standards*, Standard 7-5.8 (1989) (Commentary at 308). For example, a defendant with mental illness may admit to acts he did not commit because of delusional beliefs, and a defendant with mental retardation may make such an admission because of a factual misunderstanding or a predisposition to acquiescence. *See id.* at 309; Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 431-32 (1985).

Incompetent guilty pleas are also constitutionally forbidden because of the fundamental unfairness of holding a defendant to the terms of a deal to which he did not meaningfully assent. It is for this reason that it is now universally required that before accepting a guilty plea, a trial court must engage in a colloquy to ascertain whether the defendant understands the rights he is relinquishing.[4] *See, e.g.*, Fed. R. Crim. P. 11(c). To accept such an unknowing waiver would violate due process even if the statement were factually reliable. And just as mental disability may raise doubt about the reliability of a statement, it may also negate the understanding necessary for a constitutional waiver. *See ABA Criminal*

[4] If, as Petitioner suggests, a finding that a defendant is competent to stand trial were conclusive evidence that an individual is capable of understanding and waiving constitutional rights, it is unclear why the trial court should ask the "superfluous" questions about the defendant's understanding of what he is waiving. And what if the trial judge is persuaded after the colloquy that the defendant cannot understand the waivers; does this mean that defendant *automatically* fails the *Dusky* test and thus cannot be tried?

Justice Mental Health Standards, Standard 7-5.9(a) (1989).

Waivers of the right to counsel by mentally disabled defendants raise even more serious due process concerns. Although defendants have a right to represent themselves, this Court has recognized that they may exercise that right only if the waiver of the right to counsel is "knowingly and intelligently" made. *Faretta v. California*, 422 U.S. 806, 835 (1975). If a defendant is not competent to waive the right to a lawyer and thus proceed *pro se*, the state may try him with counsel so long as he is not also incompetent to stand trial. *See, e.g., Blackmon v. Armontrout*, 875 F.2d 164, 166 (8th Cir.), *cert. denied*, 493 U.S. 939 (1989); Bonnie, 10 Behavioral Sciences & L. at 299 ("A defendant who is competent to proceed to adjudication *with* counsel may not be allowed to proceed to adjudication *without* representation." (emphasis in original)). Were this not the rule, a defendant could avoid prosecution and punishment completely merely by raising an unsuccessful *Faretta* claim.

All of the concerns about defendants of questionable mental competence who purport to waive their trial rights and plead guilty, as well as the concerns about mentally disabled defendants who state a preference to proceed without representation, are magnified in cases, like the one at bar, where both occur. A plea of guilty is less likely to be unreliable or incompetently made when a defendant is represented by competent counsel. Conversely, an uncounseled defendant's mental incompetence is more likely to become manifest and thus amenable to the court's evaluation through the course of a criminal trial. Neither of these protective possibilities is present when a mentally disabled defendant proceeds, without counsel, to plead guilty and affirmatively seek the law's harshest and most irrevocable penalty.

II. FOR A MENTALLY DISABLED DEFENDANT TO BE HELD COMPETENT TO WAIVE THE RIGHT TO A TRIAL AND THE RIGHT TO COUNSEL, HE MUST UNDERSTAND THE RIGHTS HE IS RELINQUISHING.

It is well settled that both a guilty plea and a decision to forego the right to counsel involve the waiver of fundamental constitutional rights, and that the test of the adequacy of such waivers is whether the defendant decided to surrender these rights knowingly and intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("intentional relinquishment or abandonment of a known right or privilege"). *Cf. Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver of *Miranda* rights "must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it"); *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) ("We have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'"). "It is beyond dispute that a guilty plea must be both knowing and voluntary. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 113 S. Ct. 517, 523 (1992) (citations omitted).[5]

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[5] *Amici* supporting Petitioner appear to agree that this is the capacity necessary for a plea or waiver. *See* U.S. Br. at 11 ("a defendant must as least possess the kind of decisionmaking capacity that is needed to make fundamental choices such as whether to plead guilty and whether to accept the assistance of counsel"); Criminal Justice Legal Foundation (CJLF) Br. at 13 ("While competence and intelligence are not synonymous, they both address the same basic issue: a defendant's capacity to make a knowing and intelligent waiver of his right."). The central disagreement between our position and that of *amici* supporting Petitioner is the relationship between the relevant inquiry into "decisionmaking capacity" and a trial-focused examination under *Dusky*.

Therefore, there can be no disagreement about the standard against which the constitutional adequacy of the defendant's purported waivers is to be measured. The only remaining question is how to determine whether, despite the effect of his mental disability, the relinquishment was "knowing and intelligent" and "made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." Petitioner argues that a trial-focused determination that the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. 402 (1960), is a close enough approximation of the relevant inquiry to assure that the defendant "knowingly and intelligently" waived his rights. We disagree.

A. Defendant Was Entitled, Not to a "Separate" or "Higher" Test, but Rather to an Accurate Inquiry Into His Competence to Waive the Right to Counsel and to Plead Guilty.

Petitioner's concern about a "separate" or "higher" test for competence to waive counsel and to plead guilty creates a false dichotomy. The issue is how a court can gauge adequately whether a defendant has "knowingly and intelligently" waived his counsel and trial rights. That is the test.

Some have concluded that the best way to assure the competence of a guilty plea is to formulate the evaluative inquiry in terms distinct from those in *Dusky*. *See, e.g., Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973); *United States v. Masthers*, 539 F.2d 721 (D.C. Cir. 1976). Others have argued that the same inquiry can be accomplished by using a variant on the *Dusky* formulation. For example, the American Bar Association expresses the test as

> whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether, *given the nature and complexity of the charges and the potential consequences of a conviction*, the defendant has a rational as well as factual *understanding of the proceedings relating to entry of a plea of guilty.*

ABA Criminal Justice Mental Health Standards, Standard 7-5.1(a)(ii) (1989) (emphasis supplied). This formulation's contextual re-statement of the *Dusky* elements "embodies the Association's judgment that a special norm ought to govern plea proceedings." *Id.*, Commentary at 266.

Amici believe that a sufficiently precise and accurate inquiry can be conducted either through a specifically focused *Dusky* inquiry, as suggested by the ABA, or by a distinctly phrased test, as adopted by the Ninth and D.C. Circuits. We agree with Professor Bonnie's conclusion that what matters is not the precise wording of the test, but rather whether the formulation assures an adequate clinical and judicial inquiry into what the defendant understands and whether the defendant can do what is required of him to make a competent waiver of counsel and guilty plea.

> [C]ompetence in the criminal process is best viewed as two related but separable constructs, not as an open-textured single construct. Specifically, I draw a distinction between a foundational concept of competence to assist counsel, and a contextualized concept of decisional competence.

Bonnie, 10 Behavioral Sciences & L. at 294.

The key question regarding guilty pleas and waivers of counsel by defendants with substantial mental disabilities is whether they were able to make those choices intelligently. As Professor Bonnie notes, "Decision-making involves cognitive tasks in addition to those required for assisting in one's defense, . . . including abilities to understand and choose among alternative courses of action." *Id.* at 298. This Court has recognized similar factors as

the appropriate inquiry regarding a capital defendant's competence to withdraw a petition for certiorari. *Rees v. Payton*, 384 U.S. 312, 314 (1966) ("whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises").

The fact that guilty pleas typically emerge from a process of negotiation indicates the kind of capacity that must be required.[6] Claims that an ordinary contract is either void or voidable because of an individual's mental disability focus on "the ability to understand the nature and consequences of the transaction, the ability to act in a reasonable manner in relation to the transaction, ability to understand the character of the transaction, and the ability to understand or agree to the contract." Brakel et al., *The Mentally Disabled and the Law* 439 (3d ed. 1985).[7] It is inconceivable that the law would require less understanding of an agreement to waive constitutional rights in a context that may produce death than it requires for the purchase of a set of encyclopedias.

Mental disability is not a single, global, all-or-nothing phenomenon. Individuals who have a mental illness or mental retardation have the ability, at a particular time, to perform some tasks adequately while being unable,

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[6] In connection with other issues, this Court has evaluated plea negotiations in a manner analogous to other kinds of contracts. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262-63 (1971).

[7] As this Court noted more than a century ago, "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds." *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 20 (1872).

because of their disability, to perform others.[8] In recent decades, the law has come to reflect this truth in a variety of contexts.[9] In the law of guardianship, for example, although it once was common for a determination of incompetence to deprive the individual of all civil rights, "the trend in the law has moved toward requiring courts to examine rights separately to determine whether or not a person has lost the capacity to exercise each particular right." Brakel et al. at 374. Similarly, most states have explicit statutory provisions limiting the effect of involuntary institutionalization on other kinds of competence.[10] *Id.* at 375. In other areas of the law, the idea of differential competence is far from novel. For some time, the law of testamentary capacity has recognized that a declaration of incompetence was insufficient proof to invalidate a will. *See* Allen et al., *Mental Impairment and Legal Incompetency* 283 (1968).[10]

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[8] With regard to mental retardation, the recent revision of AAMR's definition and classification system was specifically designed to reflect more accurately the co-existence in each individual of adaptive skill limitations with "strengths in other adaptive skills or other areas of personal competence." American Association on Mental Retardation (AAMR), *Mental Retardation: Definition, Classification, and Systems of Supports* 39 (9th ed. 1992).

[9] "It is now axiomatic that a person may be competent for one purpose, such as decision-making about medical treatment, but not about others, such as the management of financial affairs. Tests of competence, and the procedures required to resolve doubts about competence, vary from context to context, depending upon both normative and practical considerations. Adherence to the idea that a criminal defendant is competent for all decision-making purposes, or for none, would be anomalous in the face of such a pervasive understanding." Bonnie, 10 Behavorial Sciences & L. at 299.

[10] *Amicus* CJLF may be partially accurate in asserting that in Blackstone's time distinctions were not drawn among degrees and types of mental disability, CJLF Br. at 19 ("A person simply was or was not 'mad.'"). *But see supra* note 3. In any event, the intervening two centuries have seen the rejection of this simplistic view in both the mental disability professions and the law.

Ability to make a rational choice among competing alternatives on a complex issue of great consequence is not an identical skill to knowing what criminal charges the individual is confronting, identifying the roles of the participants in the trial, and communicating with counsel.[11] Ascertaining whether a defendant possesses or lacks one of these capacities does not tell a court what it needs to know about whether the defendant possesses the others. The *Dusky* test provides the court with adequate information for a guilty plea or waiver of counsel *only* if the evaluation is focused on what is demanded of the defendant *in the specific context of the plea or waiver*, as recommended by the ABA.

A defendant may be able to perform what is expected of him in a counseled trial but be unable, at the time, to comprehend and make a competent choice about whether to accept a plea bargain or to competently decide to forego the assistance of counsel. An example would be "a possibly innocent defendant who insists on accepting a plea bargain, against counsel's advice, because he believes that the devil will prevent all defense witnesses from appearing at his trial." Bonnie, 10 Behavioral Sciences & L. at 308.[12] If such a delusional belief were the

[11] *Amicus* CJLF argues that inquiries into trial capacity and competence to waive rights and plead guilty are functionally indistinguishable. "[T]he ultimate question is the same: does the defendant understand what is happening?" CJLF Br. at 22. This characterization is misleading in two ways. First, "what is happening" in the two contexts is very different, and ability to understand one may not be accompanied by ability to understand the other. Second, the passage misleads by casting defendant solely as a passive observer. In trials, and particularly in plea negotiations, defendant has to *do* things, and they are different things, and ability to do one may not automatically indicate ability to do the other.

[12] Professor Bonnie offers other examples that illustrate that defendants may be competent to perform trial functions but not competent to waive rights or plead. *Id.* at 294, 308. He also suggests that there may be some defendants who are competent to plead but not to stand trial. *Id.* at 293-94.

only relevant manifestation of defendant's psychopathology, it would present no barrier to conducting a trial under *Dusky*, but would raise the most serious question of whether the right to a trial had been "knowingly and intelligently" waived. Acceptance of the plea would offend due process, but proceeding with a trial certainly would not.

It has been suggested that courts should deem a trial-competent (*Dusky*) defendant competent to enter a guilty plea despite the fact that he cannot understand the bargain or make a reasoned choice. The reason given for this remarkable proposal is that to recognize the defendant's true inability to plead may create a class of defendants who could be tried but who cannot plead guilty, and who are thus denied the benefit of the potential (and speculative) sentence reduction that might result from a plea bargain.

This policy-driven fiction concerning a defendant's true incompetence will not bear inspection. First it should be noted that the existence of such a sub-group of defendants competent to perform one task but not competent to perform another is not the product or result of the formulation of the test for the waiver's constitutional adequacy. Rather, it is a natural phenomenon; individuals can do some things and not others. The only question is how the constitutional doctrine will address the phenomenon. One way, which Petitioner appears to urge, is to make it go away by pretending it does not exist—by pretending that defendants who cannot understand the choice involved in a waiver or bargain are competent because they *could* have understood a trial.

Another approach would be to elevate the interpretation of the *Dusky* standard itself to require that before a defendant can be *tried* he must "possess the kind of decisionmaking capacity that is needed to make fundamental choices such as whether to plead guilty and whether to accept the assistance of counsel." U.S. Br.

at 11. *See also id.* at 18. This proposal would eliminate the existence of a group of defendants who can be tried but who cannot plead guilty, but does so at an extraordinary cost. If implemented, it would render incompetent to stand trial a substantial number of mentally disabled defendants who are currently found to be able to understand the proceedings and assist counsel. It is difficult to imagine how the criminal justice system's interests are advanced by refusing to adjudicate the cases of defendants who *could* stand trial on the grounds that they *would* not be able to understand a hypothetical plea agreement *that does not exist in their case.*[13]

There is no perfect solution to the issue of the potential "gap" between triability and competence to plead.[14] The best approach would be to accept any guilty pleas from defendants who are competent to understand the rights they are waiving, and try those defendants who meet the actual *Dusky* test (as compared to its more demanding replacement suggested by the United States). Although this may result in some theoretical unfairness to defendants who cannot plead, this does not raise a constitutional issue because, as this Court has held, there is no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

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[13] The suggestion for a more inclusive set of requirements for all *Dusky* evaluations is not only undesirable, it is also inaccurate as a description of what *Dusky* findings currently mean. Clinicians have been, and are currently, asked whether a particular defendant can stand trial, not the more expansive questions hypothesized by the United States. Even if this Court were to revise the interpretation of *Dusky* to encompass cognitive and decisional capabilities that are not now included, it would not magically render the previous evaluations of defendants like Respondent more comprehensive.

[14] The size of the group of defendants who may be denied the benefits of plea bargaining can be reduced, of course, by treatment or educational efforts designed to remove the impediment to decisional competence. *See* Ellis & Luckasson, 53 Geo. Wash. L. Rev. at 466 n. 286.

We agree with the Solicitor General that "the narrow purpose of the *Dusky* test is to determine the effect, if any, that a defendant's mental impairment can be expected to have on his ability to function adequately during trial." U.S. Br. at 10 (citation omitted). The present case raises the question of whether, without modification to focus on the context of a guilty plea, evaluations under *Dusky* can be put to a second, different purpose. We believe that the clinical inquiries about the two sets of skills are so different that one cannot serve as an approximation of the other.[15] Thus, the issue is not whether the Court should adopt a "different" test, but rather whether the clinical and judicial evaluation should be directed to the proper question: was defendant able to understand what needed to be understood and to do what he was required to do in order to make a competent waiver of counsel and plea of guilty.

B. Mental Disability Professionals Have the Ability to Evaluate Specific Abilities and Deficits that Relate to Competence Issues in the Criminal Justice System.

Petitioner states that "while there are currently psychological experts who claim to be able to determine an individual's competency to stand trial under the general standard of *Dusky*," it expresses doubt whether clinicians are capable of determining whether or not a defendant fully understands the factors that may be involved in a guilty plea. Pet. Br. at 31-32 (citation omitted). Similarly, Petitioner's supporting *amicus* worries that the "subtle distinctions" between trials and guilty pleas are "irrelevant for such an inexact science," CJLF Br. at

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[15] It is possible, of course, to evaluate a defendant's competence for different skills and different contexts in a single clinical evaluation, as long as the clinician is asked to address the specific skills and contexts. But absent such multiple inquiries, a clinical report on one issue will not provide a court with adequate information on the other.

22, and states that "[i]t is unreasonable to expect the mental health sciences to make such a fine distinction." *Id.* at 29.

These concerns are misplaced.

Mental disability professionals have the ability to assist the courts in performing competence evaluations that focus specifically on those skills and abilities the defendant is required to have in a particular context. This is especially true when the issue, as with a guilty plea and waiver of counsel, involves an individual's *present* mental condition, rather than an attempt to reconstruct that condition at a previous time (as with the insanity defense) or to project the likelihood of future dangerous conduct. This distinction is explicitly reflected in the ABA's recommendation that different levels of clinical expertise be required for expert evaluators and witnesses in these three categories. *ABA Criminal Justice Mental Health Standards*, Standard 7-3.12 (1989). "[A]ssessments of competency or other issues of present mental condition may be made more easily than those requiring a reconstruction of mental condition at the time of an alleged crime or a prediction of future mental condition or behavior." *Id.*, Commentary at 143-44. *See* Melton et al., *Psychological Evaluations for the Courts* 80 (1987).

Professional evaluations have been developed successfully to address many different contexts in which particular kinds of competencies are required of an individual with mental disabilities. *See, e.g.*, Appelbaum & Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 25 New England J. Med. 1635, 1636 (1988);[16] Tepper & Elwork, *Competence to Consent to Treatment As a Psycholegal Construct*, 8 L. & Human Behavior 205 (1984); Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 Crim. Justice & Behavior 147 (1990); Lindsey & Luckasson, *Consent Screening Interview for Community Residential Placement: Report on the Initial Pilot Study Data*, 29 Mental Retardation 119 (1991); Appelbaum & Roth, *Competency to Consent to Research: A Psychiatric Overview*, 39 Archives Gen. Psychiatry 951 (1982). *See generally* Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (1986). While there are common threads of analysis, each of those contexts requires the clinician to focus on the specific information the disabled individual is required to understand, and the particular tasks (such as decisionmaking) that must be performed.[17]

Clinical evaluators can assess the individual's competence to perform different tasks (e.g., competence to stand trial and competence to enter a guilty plea) in the same evaluation, but such an evaluation must focus separately on each of the issues presented. *See* Miller & Germain, *The Specificity of Evaluations of Competency to Proceed*, 14 J. Psychiatry & L. 333 (1986). Requiring that the evaluation address the relevant abilities and disabilities of a defendant is hardly extraordinary; indeed, it is artificial to ask the clinician to make a global assessment under the general label of "competence," a term which has no independent clinical meaning.

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[16] This brief takes no position on the contours of the right to consent to, or to refuse, treatment.

[17] A similar contextual approach to consent issues was recommended in the area of medical decisions. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavorial Research, 1 *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 55-62 (1982). "In the view of the Commission, any determination of the capacity to decide on a course of treatment must relate to the individual abilities of a patient, *the requirements of the task at hand*, and the consequences likely to flow from the decision. *Id.* at 57 (emphasis supplied).

If the clinician is not asked to address the defendant's ability to perform the relevant tasks in a particular context, the result will either be a generalized assessment of the ability to do nothing in particular, or a more targeted evaluation of the ability to do a task different from the one in question. Neither permits the court to make an accurate appraisal of whether the defendant is competent to waive counsel and plead guilty.

C. The Evaluation of Respondent's Competence to Waive Counsel and Plead Guilty to a Capital Charge Did Not Satisfy the Requirements of Due Process.

The trial court in this case, when it accepted Respondent's waiver of counsel and guilty plea, relied upon two psychiatric reports, each of which addressed the wrong question. Both psychiatrists, as they had been asked to do, had limited their inquiry and final evaluation solely to whether Respondent was competent to stand trial. (J.A. 8, 17). Dr. Jurasky's report, for example, focused specifically on Respondent's ability to perform tasks which were directly related to skills needed at trial. He concluded that Respondent was able to "aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so." (J.A. 8). Neither psychiatrist was asked and neither considered whether Respondent could knowingly and intelligently waive his right to counsel and plead guilty to the offenses with which he had been charged.

In addition, when Respondent entered his guilty plea, there was ample evidence before the trial court which should have raised substantial doubts about the validity of the plea. The court knew that Respondent had attempted suicide (J.A. 5-6) by shooting himself in the abdomen a few months before. *Cf. Drope v. Missouri*, 420 U.S. 162, 180 (1975) (defendant's suicide attempt was a factor justifying further inquiry into his competence). Moreover, Dr. Jurasky's report informed the court that during the interview Respondent reported having "little logical or consistent recall" of the murders themselves. (J.A. 5). Dr. Jurasky also noted that Respondent was depressed. (J.A. 7).[18] *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 218-25 (3d ed. rev. 1987); Lesse, *Masked Depression and Depressive Equivalents* in 7 *American Handbook of Psychiatry* 322-24 (Arieti, ed., 2d ed. 1981).

Finally, during the plea colloquy itself, Respondent informed the court that he was then under the influence of medications given to him at the jail. (J.A. 33). *Cf. Riggins v. Nevada*, 112 S. Ct. 1810 (1992). Inexplicably, rather than inquiring further about what medications Respondent had been given or in what way those medications were affecting him, the trial court dropped that subject and turned to a different line of questioning. (J.A. 33).

The net result was that the trial court, confronting an unrepresented individual with serious and obvious signs of mental impairment, made a judgment that Respondent was competent to waive counsel and to plead guilty to a capital charge based on evaluations that never considered his competence in that context. Such a procedure carries far too high a risk that Respondent was incompetent to make such waivers and such a plea. Due process required the court to seek specific information from the clinical evaluators about decisional competence, and to make further inquiries about the medications and about Respondent's ability to understand the waivers.

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[18] Dr. O'Gorman's report, subsequently filed with and relied upon by the court, noted that Respondent was "very depressed." (J.A. 15).

III. THE CONSTITUTIONAL STANDARD FOR MEASURING COMPETENCE TO PLEAD GUILTY HAS PARTICULAR IMPORTANCE FOR DEFENDANTS WHO HAVE MENTAL RETARDATION.

Although Respondent in the case at bar is an individual with mental illness, this Court's formulation of the requirements for guilty pleas [19] will have a major impact on defendants who have mental retardation.[20]

Guilty pleas by defendants with mental retardation present especially serious competence problems. *See generally Henderson v. Morgan*, 426 U.S. 637 (1976). The first concern is that their factual reliability is open to more serious question than is typical with guilty pleas. The well documented problems of biased responding and acquiescence to authority [21] are often exacerbated by the individual's limited vocabulary and inability to understand

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[19] *Faretta* claims by defendants with mental retardation do not appear to be a common occurrence.

[20] "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). Although people with mental retardation constitute only about 3% of the population, the disability presents substantial difficulties in the process of criminal adjudication. *See generally The Criminal Justice System and Mental Retardation: Defendants and Victims* (Conley et al. eds., 1992).

[21] *See, e.g.*, Sigelman et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 Mental Retardation 53 (1981); DeVellis, *Learned Helplessness in Institutions*, 15 Mental Retardation 10 (Oct. 1977); Ellis & Luckasson, 53 Geo. Wash. L. Rev. at 427-32, 445-52.

the concepts inherent in a particular admission.[22] Beyond the issue of reliability, there is reason for concern about what the defendant actually understands concerning the rights he is waiving and the bargain to which he will be held. *See* President's Committee on Mental Retardation, *Report to the President: Citizens with Mental Retardation and the Criminal Justice System* 10 (1991). At the most basic level, for example, bargaining for a sentence of five years to preclude a potential sentence after trial of 20 years is meaningless to a mentally retarded defendant whose arithmetical skills do not include counting that high.[23] "To give a person liberty to choose between alternatives of which he can have no appreciation is to defeat and mock the concept of liberty." President's Panel on Mental Retardation, *Report of the Task Force on Law* 15 (1963).

In cases involving mental retardation, it is particularly important to ensure that the defendant actually understands the terms of the plea and that there is an adequate factual basis for it. *See Henderson*, 426 U.S. at 645 n. 13. For these defendants, a conventional *Dusky* evaluation of trial competence will not provide adequate information to evaluate the former, and typical monosyllabic acquiescence during the plea colloquy is likely to give the trial judge a misleading picture of what the defendant understands and admits.[24] "The competence

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[22] *See, e.g.*, Ellis & Luckasson, 53 Geo. Wash. L. Rev. at 466 n. 286; *United States v. Masthers*, 539 F.2d 721, 724-25 n.20 (D.C. Cir. 1976).

[23] *See* McClennen, *Cognitive Skills for Community Living: Teaching Students with Moderate to Severe Disabilities* 236 (1991).

[24] While the standard plea colloquy is likely to be satisfactory for nondisabled defendants, the American Bar Association's recommendation regarding individuals whose comprehension is open to question is particularly appropriate and essential to evaluate the understanding of defendants who have (or may be suspected to have) mental retardation. *See* ABA, *Standards for Criminal Justice*, Standard 14-1.4(b) (2d ed. 1980).

of a defendant with mental retardation to plead guilty requires careful assessment in order to assure both that the admissions embedded in the plea are reliable *and* that the defendant understands the nature and consequences of the plea. Routine attorney-client interactions and routine plea colloquies will not do the job." Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. Crim. L. & Criminology 419, 444 (1990).

A ruling by this Court in the instant case that a trial-focused *Dusky* evaluation and a routine plea colloquy were sufficient to demonstrate competence to plead guilty to a capital crime would invite, in mental retardation cases, the acceptance of incompetent pleas that defendants did not understand and that may be unsupported by a factual foundation worthy of belief.

CONCLUSION

For the aforementioned reasons, *amici* urge the affirmance of the judgment of the Court of Appeals.

Respectfully submitted,

JAMES W. ELLIS
Counsel of Record
BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:
CHRISTIAN G. FRITZ

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